Supreme Court, U.S.
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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

JEREMIAH W. (Jay) NIXON,
ATTORNEY GENERAL STATE OF MISSOURI,
Petitioner,

v.

REPRODUCTIVE HEALTH SERVICES OF PLANNED PARENTHOOD OF THE ST. LOUIS REGION, INC., *et al*,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Missouri's Infant's Protection Act, Mo. Rev. Stat. § 565.300 (2000), prohibits use of what is commonly referred to as the "partial birth" method of abortion. Like 18 U.S.C. § 1531, at issue in *Gonzalez v. Carhart*, No. 05-380 (cert. granted Feb. 21, 2006), the Missouri prohibition lacks an exception for instances where it is required to preserve the woman's health. The Missouri statute, unlike the federal statute, does not contain legislative findings regarding the lack of any need for such an exception. But also unlike the federal statute, the Missouri law has been construed narrowly so as not to implicate any other abortion method. Despite those differences, the Missouri law raises the same fundamental question raised in *Gonzalez v. Carhart*:

Whether Missouri's Infant's Protection Act is invalid on its face, and subject to an injunction against its enforcement in all circumstances, merely because it lacks a health exception.

PARTIES TO THE PROCEEDING

Petitioner, Jeremiah W. (Jay) Nixon, Attorney General of the State of Missouri, was Appellant below. Respondents, Reproductive Health Services of Planned Parenthood of the St. Louis Region, Inc., and Dr. Robert Crist, were Appellees below. Dee Joyce Hays, then Circuit Attorney for the City of St. Louis, was also a defendant in the district court.

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PETITION FOR WRIT OF CERTIORARI

On behalf of the State of Missouri, Attorney General Jeremiah W. (Jay) Nixon respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit preventing the State from even having a trial on the merits on the question whether the Missouri's "Infant's Protection Act," Mo.Rev.Stat. § 565.300 (2000), is unconstitutional and cannot be enforced in any circumstance because it lacks an exception for the health of the mother.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit (Appendix ("App.") A-2 through A-6), is reported at 429 F.3d 803. The opinion of the U.S. District Court for the Western District of Missouri (App. A-7 through A-14) is reported at 325 F.Supp.2d 991. An earlier opinion by the Missouri Court of Appeals (App. A-15 through A-37) is reported at 97 S.W. 3d 54.

JURISDICTION

The Court of Appeals entered its judgment on November 28, 2005. Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Mo. Rev. Stat. § 565.300 (2000):

1. This section shall be known and may be cited as the "Infant's Protection Act".

2. As used in this section, and only in this section, the following terms shall mean:

(1) "Born", complete separation of an intact child from the mother regardless of whether the umbilical cord is cut or the placenta detached;

(2) "Living infant", a human child, born or partially born, who is alive, as determined in accordance with the usual and customary standards of medical practice and is not dead as determined pursuant to [Mo. Rev. Stat. § 194.005] relating to the determination of the occurrence of death, and has not attained the age of thirty

days post birth;

(3) "Partially born", partial separation of a child from the mother with the child's head intact with the torso. If vaginally delivered, a child is partially separated from the mother when the head in a cephalic presentation, or any part of the torso above the navel in a breech presentation, is outside the mother's external cervical os. If delivered abdominally, a child is partially separated from the mother when the child's head in a cephalic presentation, or any part of the torso above the navel in a breech presentation, is outside the mother's external abdominal wall.

3. A person is guilty of the crime of infanticide if such person causes the death of a living infant with the purpose to cause said death by an overt act performed when the infant is partially born or born.

4. The crime of infanticide shall be a class A felony.

5. A physician using procedures consistent with the usual and customary standards of medical practice to save the life of the mother during pregnancy or birth or to save the life of any unborn or partially born child of the same pregnancy shall not be criminally responsible under this section. In no event shall the mother be criminally responsible pursuant to this section for the acts of the physician if the physician is not held criminally responsible pursuant to this section.

6. This section shall not apply to any person who performs or attempts to perform a legal abortion if the act that causes the death is performed prior to the child being partially born, even though the death of the child occurs as a result of the abortion after the child is partially born.

7. Only that person who performs the overt act required under subsection 3 of this section shall be culpable under this section,

unless a person, with the purpose of committing infanticide, does any act which is a substantial step towards the commission of the offense which results in the death of the living infant. A "substantial step" is conduct which is strongly corroborative of the firmness of the actor's purpose to complete the commission of the offense.

8. Nothing in this section shall be interpreted to exclude the defenses otherwise available to any person under the law including defenses provided pursuant to [Mo. Rev. Stat. Chapters 562 and 563].

INTRODUCTION

On April 14, 2005, the United States Court of Appeals for the Eighth Circuit heard argument in two cases challenging statutes that prohibit the use of abortion techniques known as intact dilation and evacuation (intact D & E) or dilation and extraction (D & X) – or, in the popular vernacular, "partial birth" abortion. The first of those cases was a challenge to the federal "partial birth" statute, 18 U.S.C. § 1531. On July 8, 2005, the Eighth Circuit entered its judgment in that case, holding that the federal statute was unconstitutional on its face and affirming an injunction against its enforcement in any and all circumstances. *Carhart v. Gonzales*, 413 F.3d 791 (8th Cir.2005).

This was the second case. Here, too, the district court had enjoined enforcement of a prohibition on "partial birth" abortion, this one in Missouri's "Infant's Protection Act." On November 28, 2005, the Eighth Circuit, relying on its decision in *Carhart v. Gonzalez*, affirmed the district court's ruling. App. at A-5 through A-6.

On February 21, 2006, this Court granted the United States' petition for writ of certiorari in *Gonzalez v. Carhart*. Thus the basis for the Eighth Circuit's ruling in this case is now before the Court. The Court's decision in *Carhart* will likely affect, if not entirely decide, the question posed here. The Court should hold this petition until it decides *Carhart*, then, unless issues raised here remain, it should grant the petition, vacate the Eighth Circuit's decision, and remand for reconsideration in light of *Carhart*.

It is possible, however, that the decision in *Gonzalez v. Carhart* could leave important questions to be resolved here. That possibility is the result, in part, of the fact that the statutes at issue in this case and *Carhart* differ in two notable respects.

In *Gonzalez v. Carhart*, the United States asks the Court to

defer to the congressional finding that the "partial birth" method of abortion is never necessary to preserve the health of the mother. The Missouri law does not contain such a legislative finding. Were the Court to proceed as the United States requests, the more fundamental and broadly applicable issues raised in *Carhart* would remain open – and the need for their resolution would be heightened, since most abortion regulations lack such legislative findings.

In *Gonzalez v. Carhart*, those challenging the federal law argued that it bans not just "partial birth," but also one of the most common abortion methods, dilation and evacuation ("D & E"), *Carhart v. Ashcroft*, 331 F.Supp.2d 805, 1030-31 (D.Neb. 2004), as did the law at issue in *Stenberg v. Carhart*, 530 U.S. 914, 49-51 (2000). Here, by contrast, the Eighth Circuit struck a statute that has been authoritatively construed to ban only the "partial birth" method. It is possible, then, that this Court could hold the federal law unconstitutional because it imposes an "undue burden" on women by virtue of its alleged overinclusiveness, but leave the question of the constitutionality of the narrower Missouri statute unresolved.

The issues that would remain, were *Gonzalez v. Carhart* decided on grounds not applicable here, are important ones. They begin with the fundamental question of the standard to be applied when considering challenges to abortion regulations – a standard that this Court has not, as yet, clearly defined. They end with the meaning and proper application of *Ayotte v. Planned Parenthood of Northern New England*, 126 S.Ct. 961 (2005), where this Court rejected the premise, implicit in the Eighth Circuit's decisions, that a few unconstitutional applications of an abortion regulation statute always justify an injunction against even its constitutional application. In between are other, important questions of burdens and proof. All of those questions arise in many, perhaps most, abortion regulation cases. And with the current activity in state legislatures, the courts will continue to regularly face such cases.

Thus if the Court does not resolve the broader issues in *Gonzalez v. Carhart*, it should grant this petition.

STATEMENT

Missouri enacted the Infant's Protection Act, Mo. Rev. Stat. § 565.300 (2000), in 1999. This Act provides that a "person is guilty of the crime of infanticide if such person causes the death of a living infant with the purpose to cause death by an overt act performed when the infant is partially born or born." § 565.300.3. "Partially born" is defined as

> partial separation of a child from the mother with the child's head intact with the torso. If vaginally delivered, a child is partially separated from the mother when the head in a cephalic presentation, or any part of the torso above the navel in a breech presentation, is outside the mother's external cervical os. If delivered abdominally, a child is partially separated from the mother when the child's head in a cephalic presentation, or any part of the torso above the navel in a breech presentation, is outside the mother's external abdominal wall.

§ 565.300.2(3). The Act became effective on September 16, 1999.

Reproductive Health Services of Planned Parenthood of the St. Louis Region, Inc., and Dr. Robert Crist (jointly "Planned Parenthood") filed this suit in the U.S. District Court for the Western District of Missouri on behalf of themselves and their patients on September 17, 1999. Planned Parenthood named as defendants Jeremiah W. Nixon, Attorney General of Missouri, and Dee Joyce-Hayes, Circuit Attorney for the City of St. Louis. Planned Parenthood alleged that Missouri's Infant's Protection Act is unconstitutional because it infringes a woman's right to decide to have an abortion and is unconstitutionally vague. Planned Parenthood sought: (1) a declaration that the Act is

unconstitutional and (2) an injunction against enforcement of the Act.

The day Planned Parenthood filed suit, the district court entered an order temporarily prohibiting imple-mentation and enforcement of the Act.

On January 5, 2000, the State of Missouri filed suit in state court to obtain a construction of the scope and effect of the Infant's Protection Act. The U.S. Court of Appeals for the Eighth Circuit stayed further proceedings in the district court pending resolution of the state court suit. That suit was resolved in a November 19, 2002 decision by the Missouri Court of Appeals, Eastern District. *State v. Reproductive Health Servs. of Planned Parenthood*, 97 S.W.3d 54 (Mo.App. E.D. 2002) (App. A-15 through A-37). That court held that the Infant's Protection Act can apply to an intact dilation (dilatation) and evacuation abortion procedure (intact D & E), including the procedure known as an intact dilation (dilatation) and extraction abortion procedure (D & X), performed by a licensed physician. But it applies

> "...only if the physician *intends* to perform and in fact performs the following acts: (a) serial administration of osmotic dilators (laminaria) over a period exceeding 24 hours; (b) manipulation of the position of the fetus in utero to ensure a footlong breech delivery; (c) partial or complete separation of a living fetus from the mother with the child's head intact with the torso if vaginally delivered, a fetus is partially separated from the mother when the head in a cephalic presentation, or any part of the torso above the navel in a breech presentation, is outside the mother's external cervical os; if delivered abdominally, a fetus is partially separated from the mother when the child's head in cephalic presentation, or any part of the torso above the navel in a breech presentation,

> is outside the mother's external abdominal wall; and (d) intentional physical application of force, either by instrument or suction, to the body of the fetus itself, for the purpose of causing, and actually causing, cessation of circulation or respiration or both at or after complete or partial separation (as defined herein) of the living fetus from the mother; provided, that nothing in this judgment shall be construed as declaring that any person performing the acts described in this paragraph (6) of this judgment is necessarily guilty of the crime of infanticide."

97 S.W. 3d at 63-64 (App. A-30) (quoting the Circuit Court Order; emphasis added by the Missouri Court of Appeals).

After receiving the Missouri Court of Appeals' decision, the Eighth Circuit lifted its stay of proceedings in the district court. The district court then granted Planned Parenthood's motion for summary judgment in favor of plaintiffs and permanently enjoined enforcement of the Infant's Protection Act. (App. A-7 through A-14). The district court entered its judgment on July 12, 2004. Defendant Nixon filed his notice of appeal on August 6, 2004.

The Eighth Circuit affirmed the district court's judgment on November 28, 2005 (App. A-2 through A-6). That court concluded that while *Stenberg v. Carhart*

> does not create a per se constitutional rule requiring a health exception for all partial birth abortion bans, *Stenberg* does require a health exception whenever "substantial medical authority" supports the need for a health exception. . . . We also concluded because the "substantial medical authority" question is one of law and the facts underpinning a determination on whether there is "substantial medical authority" are legislative facts, that is facts which have salience beyond the parties involved,

> they do not have to be reproven in every subsequent challenge to a partial birth abortion restriction. . . . Thus, a partial birth abortion ban can only survive review if the government shows the factual situation now existing differs from the factual situation which was present in *Stenberg*. . . . It is not sufficient to allege *Stenberg* was erroneously decided, but rather the government must show there has been some new factual development, such as a newfound consensus in the medical community or new studies on the medical necessity of the banned procedures.

429 F.3d at 805-06 (App. A-5 through A-6). The Eighth Circuit expressly relied on its decision in *Carhart v. Gonzales*, 413 F.3d at 797 & 800-02. The court then rejected defendant Nixon's reliance on the congressional record developed in support of the federal Partial-Birth Abortion Ban Act of 2003 and the testimony of his expert as sufficient to create a dispute of fact as to whether the banned procedures are ever necessary to preserve the mother's health. 429 F.3d at 806 (App. A-7).

REASONS THE PETITION SHOULD BE GRANTED

1. There is conflict and confusion among the circuits considering abortion regulations as to the relationship between the *Salerno* "no set of circumstances" test and the *Casey* "undue burden"on a "large fraction" test – and as to whether *Stenberg v. Carhart* created a third test, and to what it might apply.

This case follows one that the Court has heard and decided this Term, and one that the Court recently agreed to consider.

The first case was *Ayotte*. There, the Court granted certiorari on a question that overlaps the one posed here: whether "the correct standard in a facial challenge to a statute regulating

abortion" is "the undue burden standard cited in *Planned Parenthood of S.E. Pa. v. Casey*, 505 U.S. 833, 876-77 (1992) and *Stenberg v. Carhart*, 530 U.S. 914, 921 (2000)," or the "'no set of circumstances' standard set forth in *United States v. Salerno*, 481 U.S. 739 (1987)." Petition for Writ of Certiorari, *Ayotte v. Planned Parenthood of Northern New England*, No. 04-1144, at i. New Hampshire Attorney General Ayotte explained that there was a conflict among the circuits on that question. *Id.* at 10-11. But when this Court decided that case on January 18, it did not address that question.

The second case is *Gonzalez v. Carhart*, No. 05-380. On February 21, 2006, the Court granted a writ of certiorari on this question:

> Whether, notwithstanding Congress's determination that a health exception was unnecessary to preserve the health of the mother, the Partial Birth Abortion Ban Act of 2003 is invalid because it lacks a health exception or is otherwise unconstitutional on its face.

Petition for Writ of Certiorari, *Gonzalez v. Carhart*, No. 05-380, at I. As it moves beyond the question of congressional findings, this question subsumes the questions posed here and in *Ayotte*.

In his petition, the Solicitor General did not assert a conflict among the circuits as to the question he posed, as had New Hampshire. Perhaps that was because of his focus on congressional findings – as to which there is neither conflict nor confusion, at least in the abortion context. But the Solicitor General nonetheless found considerable confusion in the law – confusion arising from comparing *Salerno*, *Casey*, and *Stenberg v. Carhart*. *Id.* at 18-20. And like Attorney General Ayotte, he explained that it is critical to know what test to apply to statutes regulating abortion. Presumably his brief on the merits will address not only the question of what congressional findings mean to the courts, but also to what standard a congressional act regulating

abortion should be held.

Analysis of the problem of standards begins with citation to the rule articulated in *Salerno*: that a statute can be declared unconstitutional on its face only if there is "no set of circumstances" under which it could be constitutionally applied. 481 U.S. at 745. That rule is applied to a broad range of statutes. In fact, at least outside the abortion regulation context, it has been applied generally. The conflicts and confusion that merit this Court's consideration here arise, of course, in the narrow – but frequently legislated and litigated – abortion context.

The confusion began with *Casey* – decided 5 years after *Salerno*. The *Casey* plurality opinions never even mentioned *Salerno*, although the dissent did. *See Casey*, 505 U.S. at 972 (Rehnquist, C.J., concurring and dissenting in part). In *Casey*, the dispositive opinion instead looked for an "undue burden" on women. 505 U.S. at 874. But at issue in *Casey* was a regulation that imposed an "undue burden" on a "large fraction" of women. *Id.* at 895. Thus the Court never addressed what standard to apply when a regulation affects very few – if any – women.

Whether it is because the Court issued multiple opinions in *Casey*, none commanding a majority, because the opinions that together constituted a majority in *Casey* neither distinguished nor applied *Salerno*, or because *Casey* involved a regulation that adversely affected a "large fraction" of women, the lower courts have, since *Casey*, reached conflicting results when asked what standard to apply to abortion regulations statutes.

Before *Casey*, the rule was to apply *Salerno* even when the statute being challenged regulated abortion. *See Ohio v. Akron Ctr. for Reproductive Health*, 497 U.S. 502, 514 (1990). That remains the rule in the Fourth and Fifth Circuits. *Barnes v. Moore*, 970 F.2d 12, 14 n.2 (5th Cir. 1992); *see also Causeway Med. Suite v. Ieyoub*, 109 F.3d 1096, 1102-03 (5th Cir. 1997) (declining to

reverse *Barnes*); *Manning v. Hunt*, 119 F.3d 254, 268 n.4 (4th Cir. 1997); *Greenville Women's Clinic v. Bryant*, 222 F.3d 157, 164-65 (4th Cir. 2000). But the Third, Sixth, Seventh, Eighth, Ninth, and Tenth Circuits have carved out abortion regulation cases from *Salerno* and instead applied the *Casey* "undue burden" test. *Planned Parenthood of Cent. N.J. v. Farmer*, 220 F.3d 127, 142-43 (3d Cir. 2000); *Planned Parenthood of S. Arizona v. Lawall*, 180 F.3d 1022, 1025-26 (9th Cir. 1999), *amended on denial of reh'g*, 193 F.3d 1042 (9th Cir. 1999); *Women's Med. Prof. Corp. v. Voinovich*, 13 F.3d 187, 193-96 (6th Cir. 1997), *cert. denied* 523 U.S. 1036 (1998); *Jane L. v. Bangerter*, 102 F.3d 1112, 1116 (10th Cir. 1996), *cert denied sub nom. Leavitt v. Jane L.*, 520 U.S. 1274 (1999); *Planned Parenthood, Sioux Falls Clinic v. Miller*, 63 F.3d 1452, 1456-58 (8th Cir. 1995), *cert. denied sub nom. Janklow v. Planned Parenthood*, 517 U.S. 1174 (1996); *A Woman's Choice – E. Side Women's Clinic v. Newman*, 305 F.3d 684, 687 (7th Cir. 2002), *cert. denied*, 537 U.S. 1192 (2003). They usually do so without considering whether the particular "undue burden" is imposed on a "large fraction" of women – though that sometimes seems obvious.

Here, the Eighth Circuit did not tackle that conflict. That court never reached the question of what the *Casey* standard means, when applied to a case in which the regulation burdens far less than a "large fraction" of women. And in *Ayotte* this Court avoided reaching the conflict by ruling on very narrow grounds. Thus the confusion noted by New Hampshire in seeking certiorari in *Ayotte* still reigns.

That is true despite *Stenberg v. Carhart* – where the Eighth Circuit claimed to have found a new, dramatically stricter standard. In *Stenberg*, this Court disclaimed the possibility that it was creating a new standard. The Court considered the constitutionality of a Nebraska statute that barred the "partial birth" method of abortion (though its bar, perhaps like the one at issue in *Gonzalez v. Carhart* but unlike the one at issue here, was worded so as to

possibly cover another, much more common method). The Court identified "two independent reasons" for the Nebraska statute's unconstitutionality: "First, the law lacks any exception '"for the preservation of the ... health of the mother."' *Casey*, 505 U.S., at 879, 112 S.Ct. 2791 (plurality opinion). Second, it 'imposes an undue burden on a woman's ability' to choose a D & E abortion, thereby unduly burdening the right to choose abortion itself. *Id.*, at 874, 112 S.Ct. 2791." 530 U.S. at 930. Rather than depart from *Casey*, the Court said it made a "straightforward application of [the *Casey*] holding." 530 U.S. at 938.

Here and in *Gonzalez v. Carhart*, the Eighth Circuit claims to have applied *Stenberg*. That court reads *Stenberg* to reduced the test for determining the facial validity of an abortion regulation that lacks a "health of the woman" exception to a single question: is there "substantial medical authority" that the regulation would adversely affect the health of some woman, some time? There is no need, in the Eighth Circuit's view, to consider whether the lack of such an exception imposes an "undue burden" on a "large fraction" – or even a small fraction – of women, as this Court did in *Casey*.

If *Salerno* no longer states the standard by which facial challenges to abortion regulations are to be judged, this Court should say so. And if some set of criteria – perhaps the absence of a "health" exception, perhaps a regulation that goes to method rather than surrounding circumstances – removes cases not just from *Salerno*, but from *Casey*, this Court should say how and which, either in *Gonzalez v. Stenberg* or here.

2. The *Stenberg* test – if it is a different test – cannot reasonably be read to produce the result envisioned by the Eighth Circuit.

The Eighth Circuit not only ignored the *Casey* standard in favor of one it derived from *Stenberg*, it applied that standard in a

way that creates perhaps the very opposite of *Salerno*. In the Eighth Circuit, for at least some portion of abortion regulation challenges, plaintiffs no longer must show there is "no set of circumstances" under which a regulation may be constitutionally applied. In fact, they may rest their case having shown that there is some circumstance – perhaps a single, hypothetical circumstance – where the regulation cannot be constitutionally applied. The Eighth Circuit and the district court concluded that under their reading of *Stenberg v. Carhart*, once Planned Parenthood submitted evidence that some physician believes there is some woman who some day may be better off to any degree with an abortion using the "partial birth" technique than an alternative, the proceedings were over. If that is now the rule, the Court in *Stenberg v. Carhart* did not merely apply *Casey*.

The practical significance of the Eighth Circuit's version of the *Stenberg v. Carhart* rule is evident here. Unlike *Gonzalez v. Carhart*, this case never went to trial; the district court never heard evidence, nor did it make credibility determinations. The Eighth Circuit described the record before the district court:

> Planned Parenthood moved for summary judgment relying on the Supreme Court's decision in *Stenberg*, a brief from *Stenberg*, a statement by the plaintiff regarding the lower risk associated with intact D & E and a statement of the American College of Obstetricians and Gynecologists. Missouri responded with the statement of their own expert contending the banned procedures were never medically necessary and the findings of Congress that such procedures were never medically necessary.

App. at A-4. That brief description actually oversells the record presented by Planned Parenthood.

The *Stenberg* decision and brief did not, of course, provide admissible evidence on which summary judgment could be based.

And the statement of the American College of Obstetricians and Gynecologists provided little support; the State responded with a Statement of Policy from the same organization that a "select panel" it had convened "could identify no circumstances under which [the 'partial birth' procedure] would be the only option to save the life or preserve the health of the woman." 8th Cir. App. 59. Really, Planned Parenthood had little more than the testimony – never tested on cross-examination – of a physician it employed.

The State countered with the transcript of Dr. Curtis Cook from the trial in the state case decided in *State v. Reproductive Health Servs. of Planned Parenthood*. Dr. Cook testified that the "partial birth" method is never necessary to preserve a woman's health because there are other options available. The State also presented the testimony from the same trial of Dr. Phillip Stubblefield. Dr. Stubblefield testified that some physicians take steps to produce fetal death prior to removing the fetus from the uterus and that abortions following this practice have the lowest reported rate of complications for any late-term abortion technique.

But according to the lower courts, after *Stenberg v. Carhart* none of that mattered. There was no need to weigh evidence or judge credibility. Once Planned Parenthood presented *any* medical evidence that some woman, some day, might be benefitted by the "partial birth" technique, it won.

Of course, we may never see an instance in which a person challenging an abortion restriction cannot find some medical professional who will provide an opinion sufficient to meet that new standard. In the Eighth Circuit, the only question will now be whether the particular abortion regulation falls within the scope of *Stenberg v. Carhart* – whatever that scope may be. If so, the states might as well capitulate. But before they do, they should have a clearer statement than *Stenberg v. Carhart* provides -- and a rationale that would both support a departure from *Casey* and define the scope of that departure.

3. Enjoining any and all applications of an abortion regulation statute based on a very rare circumstance cannot be reconciled with *Ayotte*.

The district court did not just enjoin application of the Missouri statute in the rare instances where Planned Parenthood's physician says that the "partial birth" method is better for the health of the woman. It enjoined application of the statute even when other methods provide equal or even better protection. The Eighth Circuit affirmed, and that broad injunction remains in place.

Of course, neither the district court, nor the Eighth Circuit, nor the parties had the benefit of this Court's decision in *Ayotte*. Thus the lower courts never considered whether the Missouri statute could "be declared invalid to the extent that it reaches too far, but otherwise left intact." *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 504 (1985), *quoted with approval*, *Ayotte*, 126 S.Ct. at 968. Nor did they consider the question posed on remand: "Would the legislature have preferred what is left of its statute to no statute at all?" 126 S.Ct. at 968. Neither the parties nor the lower courts addressed those issues here because, frankly, until *Ayotte* it appeared to them – as it did to the parties in *Ayotte* itself – that broad injunctive relief was the only possibility when an abortion regulation is challenged. *See, e.g.*, *Stenberg v. Carhart*, 530 U.S. at 945-46 (application of the statute enjoined in all instances, despite the fact that few women are affected).

If the Court does not grant this petition to consider the conflict among the circuits on the standard to be applied in abortion regulation cases generally, or to consider the real meaning and appropriate application of a *Stenberg v. Carhart* standard, it should nonetheless remand this case for reconsideration of the relief granted, in light of *Ayotte*.

CONCLUSION

For the reasons stated above, the Court should grant the petition and issue a writ of certiorari.

Respectfully submitted,

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IN THE
SUPREME COURT OF THE UNITED STATES

JEREMIAH W. (Jay) NIXON,
ATTORNEY GENERAL STATE OF MISSOURI,
Petitioner,

v.

REPRODUCTIVE HEALTH SERVICES OF PLANNED PARENTHOOD OF THE ST. LOUIS REGION, INC., *et al*,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

APPENDIX

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United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 04-2909

Reproductive Health Services of Planned Parenthood of the St. Louis Region, Inc., on behalf of and their patients, also known as Planned Parenthood; Robert Crist,	*	
Appellees,	*	Appeal from the United States District Court for
Jeremiah W. Nixon, Attorney General of Missouri in his official capacity,	*	the Western District of Missouri.
Appellant.	*	

Submitted: April 14, 2005
Filed: November 28, 2005

Before LOKEN, Chief Judge, FAGG, and BYE, Circuit Judges.

BYE, Circuit Judge.

In 1999, the Missouri legislature enacted the "Infant's Protection Act," which established the crime of infanticide. Mo. Rev. Stat. § 565.300. The statute criminalizes what is commonly

known as partial birth abortion. The district court[1] determined, at summary judgment, the statute was unconstitutional under the Supreme Court's decision in Stenberg v. Carhart, 530 U.S. 914 (2000), because the ban contained no exception for the preservation of the health of the mother. This appeal follows. Reviewing the merits, see, Reproductive Health Servs. of Planned Parenthood v. Nixon, No. 04-2674, slip. op. at 3-7 (8th Cir. Nov. 16, 2005) (review-ing the merits of a companion case between the same parties challenging the constitutionality of Mo. Rev. Stat. § 188.039, notwithstanding the Attorney General's claim of Eleventh Amendment immunity); but see id. at 9-13 (Bye, J., dissenting) (concluding the court lacked Article III jurisdiction because the Attorney General lacks enforcement capabilities), we affirm the judgment of the district court.

I

Missouri's "Infant's Protection Act," Mo. Rev. Stat. § 565.300, provides that a "person is guilty of the crime of infanticide if such person causes the death of a living infant with the purpose to cause death by an overt act performed when the infant is partially born or born." As construed by the Missouri Court of Appeals, the law criminalizes the performance of what is known as intact dilation and evacuation (intact D&E) and dilation and extraction (D&X) abortions. See State v. Reproductive Health Servs. of Planned Parenthood, 97 S.W.3d 54, 63-64 (Mo. App. E.D. 2002). These are the procedures commonly known as "partial birth abortions. See Women's Med. Prof'l Corp. v. Taft, 353 F.3d 436, 439 (6th Cir. 2003). The statute states that a "physician using procedures consistent with the usual and customary standards to save the life of the mother during pregnancy or birth to save the life of any unborn or partially born child of the same pregnancy shall

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[1]The Honorable Scott O. Wright, United States District Judge for Western District of Missouri.

not be criminally responsible. . . ." Mo. Rev. Stat. § 565.300(5). The statute does not exempt procedures done to preserve the health of the mother. See Reproductive Health Servs., 97 S.W.3d at 63-65. It also only applies if the fetus/child is alive at the time of the procedure and thus would exempt what would otherwise be a prohibited procedure if death was initially caused via other methods in utero. Mo. Rev. Stat. § 565.300.3.

Planned Parenthood moved for summary judgment relying on the Supreme Court's decision in Stenberg, a brief from Stenberg, a statement by the plaintiff regarding the lower risk associated with intact D&E and a statement of the American College of Obstetricians and Gynecologists. Missouri responded with the statement of their own expert contending the banned procedures were never medically necessary and the findings of Congress that such procedures were never medically necessary. The district court granted the motion for summary judgment finding there was "no genuine issue of material fact as to the presence of a health exception." Reproductive Health Servs. of Planned Parenthood v. Nixon, 325 F.Supp. 2d 991, 994-95 (W.D. Mo. 2004); accord Richmond Med. Ctr. for Women v. Hicks, 409 F.3d 619, 625 (4th Cir. 2005) (holding that Stenberg established a per se constitutional rule).

II

A grant of summary judgment is reviewed de novo. Stone Motor Co. v. General Motor Co., 400 F.3d 603, 607 (8th Cir. 2005). Summary judgment is appropriate when the evidence, viewed in a light most favorable to the non-moving party, demonstrates there is no genuine issue of material fact, and the moving party is entitled to judgment as a matter of law. Strate v. Midwest Bankcentre, Inc., 398 F.3d 1011, 1018-19 (8th Cir. 2005). If the movant can show there is no issue as to any material fact the non-movant must "set forth facts showing there is a genuine issue for trial." Fed. R. Civ. P. 56(3); see also Celotex Corp. v. Catrett, 477 U.S. 317, 322-24

(1986). "This court may affirm a grant of summary judgment on any ground supported by the record, even if not relied on by the district court." Kratzer v. Rockwell Collings, Inc., 398 F.3d 1040, 1043 (8th Cir. 2005).

In Stenberg v. Carhart, 530 U.S. 914 (2000), the Supreme Court struck down a Nebraska law prohibiting partial birth abortions for two independent reasons. First the Court concluded the lack of an exception on to the ban for the preservation of the health of the mother (in contrast to the life of the mother) made the statute unconstitutional. Id. at 938. Second, the Court concluded the Nebraska statute went beyond prohibiting "partial birth abortions" and effectively prohibited the most common form of late term abortions and this restriction was an unconstitutional "undue burden" on the right to abortion itself. Id. at 945-46.

Our recent opinion in Carhart v. Gonzales, 413 F.3d 791 (8th Cir. 2005), required us to determine the legal standards set forth by Stenberg for partial birth abortion regulations. We con-cluded that while Stenberg does not create a per se constitutional rule requiring a health exception for all partial birth abortion bans, Stenberg does require a health exception whenever "substantial medical authority" supports the need for a health exception. Id. at 797. We also concluded because the "substantial medical authority" question is one of law and the facts underpinning a determination on whether there is "substantial medical authority" are legislative facts, that is, facts which have salience beyond the parties involved, they do not have to be reproven in every subsequent challenge to a partial birth abortion restriction. Id. at 800. Thus, a partial birth abortion ban can only survive review if the government shows the factual situation now existing differs from the factual situation which was present in Stenberg. Id. at 801. It is not sufficient to allege Stenberg was erroneously decided, but rather the government must show there has been some new factual development, such as a newfound consensus in the medical community or new studies on the medical necessity of the banned

procedures. Id. at 802.

Missouri relies on two items of evidence in opposing summary judgment. First, the State relies on the congressional record developed in support of federal Partial-Birth Abortion Ban Act of 2003 to support its position that the banned procedures are never medically necessary. We have, however, already concluded the congressional record (along with congressional findings) do not show there has been a change in the medical evidence since Stenberg was decided. Id. at 801. Second, the State relies on the testimony of one of its experts that the banned procedures are never necessary to preserve the mother's health. This statement adds nothing new. There was evidence in the congressional record and in Stenberg that the medical community disagrees as to the medical necessity of the banned procedures. Id. at 802. Simply proffering the testimony of one expert who supports Missouri's position does not show any new evidence. Because the State has not introduced any evidence showing there has been a change in the medical authority since the Supreme Court's decision in Stenberg, there is no question of material fact and summary judgment was therefore appropriate.

III

For the reasons stated above, the judgment of the district court is affirmed.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI
CENTRAL DIVISION

REPRODUCTIVE HEALTH SERVICES OF PLANNED PARENTHOOD OF THE ST. LOUIS REGION, INC., et al.,	)	
Plaintiffs,	)	
vs.	)	No. 99-04231-CV-C-SOW
JEREMIAH W. NIXON, et al.,	)	
Defendants.	)	

ORDER

Before the Court is plaintiffs' Motion for Summary Judgment (Doc. # 84), which is fully briefed. Plaintiffs' motion requires this Court to assess the constitutionality of the Missouri Infant's Protection Act, Mo. Rev. Stat. § 565.300 (WESTLAW through 2004 legislation). The United States Supreme Court's decision in Stenberg v. Carhart, 530 U.S. 914 (2000), compels the conclusion that the Missouri Infant's Protection Act violates the United States Constitution. Accordingly, this Court grants plaintiffs' Motion for Summary Judgment.

I. Background

The Missouri Infant's Protection Act creates the Class A felony of infanticide, which is defined as causing the "death of a living infant with the purpose to cause said death by an overt act performed when the infant is partially born or born." Mo. Rev. Stat.

§ 565.300.3 (WESTLAW through 2004 legislation). The Act defines "living infant" as "a human child, born or partially born, who is alive, as determined in accordance with the usual and customary standards of medical practice and is not dead . . . and has not attained the age of thirty days post birth [.]" Id. § 565.300.2(2) (citation omitted). It further defines "partially born" as "partial separation of a child from the mother with the child's head intact with the torso. If vaginally delivered, a child is partially separated from the mother when the head in a cephalic presentation, or any part of the torso above the navel in a breech presentation, is outside the mother's external cervical os. If delivered abdominally, a child is partially separated from the mother when the child's head in a cephalic presentation, or any part of the torso above the navel in a breech presentation, is outside the mother's external abdominal wall." Id. § 565.300.2(3). Finally, the Act defines "born" as "complete separation of an intact child from the mother regardless of whether the umbilical cord is cut or the placenta detached [.]" Id. § 565.300.2(1).

Of particular relevance to this lawsuit is Section 565.300.5 of the Act, which reads: "A physician using procedures consistent with the usual and customary standards of medical practice to save the life of the mother during pregnancy or birth or to save the life of any unborn or partially born child of the same pregnancy shall not be criminally responsible under this section." Id. § 565.300.5. It is undisputed that the Act does not contain a health exception. Stenberg, 530 U.S. at 930 (Nebraska statute unconstitutional because statute "lacks any exception for the preservation of the . . . health of the mother."); *see also* State of Missouri v. Reproductive Health Services of Planned Parenthood of the St. Louis Region, Inc., et al., 97 S.W.3d 54, 63-65 (Mo. Ct. App. 2002) ("[W]e find nothing in either the language of the Act or its limited legislative history that supports the view that the Act provides an exception to liability for actions undertaken to preserve the health of the mother.").

On September 17, 1999, Reproductive Health Services of Planned Parenthood of the St. Louis Region and Dr. Robert Crist, M.D., commenced this action seeking declaratory and injunctive relief. Missouri Attorney General Jeremiah W. Nixon and St. Louis Circuit Attorney Dee Joyce-Hayes, both sued in their official capacities, were named as defendants. A temporary restraining order enjoining the Act was entered by this Court on the day the lawsuit was commenced. Four days later, this Court, pursuant to the agreement of the parties, set this case for trial on March 27, 2000, and extended the temporary restraining order until final disposition on the merits.

On January 5, 2000, the State of Missouri filed a lawsuit in the Circuit Court for the City of St. Louis against plaintiffs seeking a declaration as to the scope and meaning of the Act. On January 21, 2000, this Court enjoined the state proceeding and refused to abstain from exercising federal jurisdiction. Soon after, the State appealed this Court's ruling to the United States Court of Appeals for the Eighth Circuit. On March 23, 2000, the United States Court of Appeals for the Eighth Circuit stayed the proceedings in this Court and allowed the state proceedings to move forward.

The Honorable Robert H. Dierker tried the state lawsuit in a series of hearings commencing May 24, 2000, and concluding on August 17, 2000. On December 5, 2000, Judge Dierker issued a declaration as to the scope and meaning of the Act. State of Missouri v. Reproductive Health Services of Planned Parenthood of the St. Louis Region, Inc., et al., No. 004-00008 (Mo. Cir. Ct., 22nd Cir., Dec. 5, 2000). Specifically, Judge Dierker ruled that the Act did not apply to the following abortion procedures: suction curettage or vacuum aspiration, induction, hysterectomy, hysterotomy, and dismemberment or nonintact dilation (dilatation) and evacuation ("D & E"). Id. at 52. Judge Dierker also ruled that the Act did apply to the intact D & E abortion procedure and a variation of the intact D & E abortion procedure known as intact dilation (dilation) and extraction ("D &

X").[1] Id. Moreover, Judge Dierker held that a health exception could be read into the act, although a health exception could not be found explicitly in the text of the Act. Id. at 53.

Judge Dierker's ruling was appealed to the Missouri Court of Appeals for the Eastern District of Missouri. On November 19, 2002, the Missouri Court of Appeals reversed the part of the judgment that read a health exception into the Act and also modified the judgment to change the mens rea requirement. State of Missouri v. Reproductive Health Services of Planned Parenthood of the St. Louis Region, Inc., et al., 97 S.W.3d 54, 63-65 (Mo. Ct. App. 2002). Pursuant to the Opinion of the Missouri Court of Appeals, the following abortion procedures are banned by the Act:

> [I]ntact dilation (dilatation) and evacuation abortion procedure[s] (intact D & E), including the procedure known as an intact dilation (dilatation) and extraction abortion procedure (D & X), performed by a licensed physician, including defendant Crist, if and only if, prior to performing the abortion the physician plans and has a purpose to perform and in fact purposely performs the following acts: (a) serial administration of osmotic dilators (laminaria) over a period exceeding 24 hours; (b) manipulation of the position of the fetus *in utero* to ensure a footling breech delivery; (c) partial or complete separation of a living fetus from the mother with the child's head intact with the torso–if vaginally delivered, a fetus is partially separated from the mother when the head in a cephalic presentation, or any part of the torso above the navel in a breech presentation, is outside the mother's external cervical os; if delivered abdominally, a fetus is

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[1]For a description of these abortion procedures, *see* Stenberg, 530 U.S. at 924-929.

> partially separated from the mother when the child's head in a cephalic presentation. or any part of the torso above the navel in a breech presentation, is outside the mother's external abdominal wall; and (d) intentional physical application of force, either by instrument or suction, to the body of the fetus itself, for the purpose of causing, and actually causing, cessation of circulation or respiration or both at or after complete or partial separation (as defined herein) of the living fetus from the mother.[2]

Id. at 63, 64.

On July 24, 2003, the United States Court of Appeals for the Eighth Circuit issued its mandate lifting the stay of the proceedings in this Court. Plaintiffs' Motion for Summary Judgment is fully briefed, and, consequently, this case is ripe for review.

II. Standard

Pursuant to Federal Rule of Civil Procedure 56(c), summary judgment is appropriate if there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. *See* Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-48 (1986). The initial burden is on the moving party to establish the absence of a genuine issue of material fact. Dush v. Appleton Elec. Co., 124 F.3d 957, 963 (8th Cir. 1997). "Once the moving party shows that there are no material issues of fact in dispute, the burden shifts to the nonmoving party to set forth facts

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[2]The underlined portion is the modification made by the Missouri Court of Appeals as to the mens rea requirement. The language contained in Judge Dierker's Order is the following: "if and only if the physician intends to perform and in fact intentionally performs the following acts . . . ." State of Missouri, No. 004-00008 at 52.

showing that there is a genuine issue for trial." Donovan v. Harrah's Maryland Heights Corp., 289 F.3d 527, 529 (8th Cir. 2002).

III. Analysis

Plaintiffs argue that pursuant to the United States Supreme Court's decision in Stenberg v. Carhart, 530 U.S. 914 (2000), this Court must conclude that the Missouri Infant's Protection Act is unconstitutional because it "makes no exception for situations where the banned procedure is the most appropriate procedure to preserve the health of the pregnant woman." Plaintiffs' Suggestions in Support at 8.

At issue in Stenberg was a Nebraska statute that prohibited "partial birth abortion" except where "necessary to save the life of the mother. . . ." Id. at 921. Similar to the Missouri Infant's Protection Act, the Nebraska statute banned certain intact D & E procedures, including the D & X procedure.[3] Id. at 926-30. The Supreme Court specifically found that a health exception was necessary because "substantial medical authority supports the proposition" that banning these abortion procedures could endanger women's health. Id. at 937-38. Thus, "a statute that altogether forbids D & X creates a significant health risk. The statute consequently must contain a health exception." Id. at 938; *see also* Planned Parenthood v. Owens, 287 F.3d 910, 917-918 (10th Cir. 2002) ("*Stenberg* also confirmed that the lack of a health exception is a sufficient ground for invalidating a state abortion statute."); Richmond Medical Center for Women v. Gilmore, 219 F.3d 376, 377 (4th Cir. 2000) ("The Court has . . . unequivocally held that any ban on partial-birth abortion must include an exception for the

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[3]The Supreme Court stated that the terms intact D & E and D & X are sufficiently similar so that the terms can be used interchangeably. Stenberg, 530 U.S. at 928.

health of the mother in order to be constitutional."); Planned Parenthood v. Farmer, 220 F.3d 127, 152-153 (3rd Cir. 2000) (Alito, J., concurring) (District Court must be affirmed because "the New Jersey statute, like its Nebraska counterpart, lacks an exception for the preservation of the health of the mother. Without such an exception, the New Jersey statute is irreconcilable with Part II-A of *Carhart*."). Because the Nebraska statute included only a life exception, and "lack[ed] any exception for the preservation of the . . . health of the mother," the Court held the statute unconstitutional.[4] Id.

The Missouri Court of Appeals' Opinion makes it clear that the Missouri Infant's Protection Act bans the D & X abortion procedure. The Opinion also makes it clear that the Missouri Infant's Protection Act fails to contain an exception to protect the health of the pregnant woman. Because there are no genuine issues of material fact as to the presence of a health exception, this Court, pursuant to Stenberg v. Carhart, must conclude that the Missouri Infant's Protection Act is unconstitutional.

IV. Conclusion

Based on the foregoing, it is hereby

ORDERED that plaintiff's Motion for Summary Judgment (Doc. # 84) is granted. It is further

ORDERED that defendants, and their employees, agents, and successors, are PERMANENTLY ENJOINED from enforcing the

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[4]The Supreme Court also held that the Nebraska statute was unconstitutional because it imposed "an undue burden on a woman's ability to choose a D & E abortion, thereby unduly burdening the right to choose abortion itself." Stenberg, 530 U.S. at 930.

Missouri Infant's Protection Act, Mo. Rev. Stat. § 565.3000 (WESTLAW through 2004 legislation).

/s/Scott O. Wright
SCOTT O. WRIGHT
Senior United States District Judge

Dated: 7-9-04

IN THE MISSOURI COURT OF APPEALS
EASTERN DISTRICT
DIVISION FOUR

STATE OF MISSOURI,	)	No. ED79435
	)	
Respondent/Cross-Appellant,	)	Appeal from the Circuit
	)	Court of the City of
vs.	)	St. Louis
	)	
REPRODUCTIVE HEALTH	)	
SERVICES OF PLANNED	)	
PARENTHOOD OF THE	)	
ST. LOUIS REGION, INC., and	)	
ROBERT CRIST, M.D.,	)	
	)	FILED: November 19,
Appellants/Cross-Respondents.	)	2002

Before Sherri B. Sullivan, P.J., Lawrence G. Crahan, J., and Lawrence E. Mooney, J.

PER CURIAM

Reproductive Health Services of Planned Parenthood of the St. Louis Region and Dr. Robert Crist, M.D. (collectively "RHS") appeal and the State of Missouri cross-appeals various aspects of the declaratory judgment entered in the State's action seeking construction of the Missouri Infant's Protection Act (the "Act"), section 565.300 RSMo 2000.[1] RHS asserts the trial court erred in construing the Act to contain an exemption from liability for prohibited acts undertaken to preserve the health of the mother. RHS and the State both appeal paragraph (6) of the judgment on

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[1]All further statutory references are to RSMo 2000 unless otherwise indicated.

the ground that it is inconsistent with legislative intent as construed by the court elsewhere in its memorandum. The State also seeks additional declaratory relief. We reverse and strike paragraph (7) judgment construing the Act to contain an exemption from liability for prohibited acts undertaken to preserve the health of the mother. We modify paragraph (6) of the judgment. As so modified, we affirm the judgment in all other respects.

The standard of review for a declaratory judgment is the same as that established in Murphy v. Carron, 536 S.W.2d 30 (Mo.1976), for court-tried cases. Laclede County v. Douglass, 43 S.W.3d 826, 827 (Mo. banc 2001). The judgment of the trial court will be affirmed unless there is no substantial evidence to support it, it is against the weight of the evidence, or it erroneously declares or applies the law. Murphy, 536 S.W.2d at 32. However, construction of a statute is purely a matter of law, which must be reviewed de novo. Martinez v. State, 24 S.W.3d 10, 15 (Mo.App.2000).

The Missouri General Assembly passed the Act in 1999. The Governor vetoed the bill. However, the Act became law after the General Assembly overrode the veto on September 16, 1999. The Act provides:

> 1. This section shall be known and may be cited as the "Infant's Protection Act".
>
> 2. As used in this section, and only in this section, the following terms shall mean:
>
> (1) "Born", complete separation of an intact child from the mother regardless of whether the umbilical cord is cut or the placenta detached;
>
> (2) "Living infant", a human child, born or partially born, who is alive, as determined in accordance with the

usual and customary standards of medical practice and is not dead as determined pursuant to section 194.005, RSMo, relating to the determination of the occurrence of death, and has not attained the age of thirty days post birth;

(3) "Partially born", partial separation of a child from the mother with the child's head intact with the torso. If vaginally delivered, a child is partially separated from the mother when the head in a cephalic presentation, or any part of the torso above the navel in a breech presentation, is outside the mother's external cervical os. If delivered abdominally, a child is partially separated from the mother when the child's head in a cephalic presentation, or any part of the torso above the navel in a breech presentation, is outside the mother's external abdominal wall.

3. A person is guilty of the crime of infanticide if such person causes the death of a living infant with the purpose to cause said death by an overt act performed when the infant is partially born or born.

4. The crime of infanticide shall be a class A felony.

5. A physician using procedures consistent with the usual and customary standards ~~of medical~~ practice to save the life of the mother during pregnancy or birth or to save the life of any unborn or partially born child of the same pregnancy shall not be criminally responsible under this section. In no event shall the mother be criminally responsible pursuant to this section for the acts of the physician if the physician is not held criminally responsible pursuant to this section.

6. This section shall not apply to any person who performs or attempts to perform a legal abortion if the act that causes the death is performed prior to the child being

partially born, even though the death of the child occurs as a result of the abortion after the child is partially born.

7. Only that person who performs the overt act required under subsection 3 of this section shall be culpable under this section, unless a person, with the purpose of committing infanticide, does any act which is a substantial step towards the commission of the offense which results in the death of the living infant. A "substantial step" is conduct which is strongly corroborative of the firmness of the actor's purpose to complete the commission of the offense.

8. Nothing in this section shall be interpreted to exclude the defenses otherwise available to any person under the law including defenses provided pursuant to chapters 562 and 563, RSMo.

Section 565.300.

The day after the General Assembly overrode the Governor's veto, RHS brought suit in the United States District Court for the Western District of Missouri seeking injunctive relief against enforcement of the Act. The district court entered a temporary restraining order enjoining the Act and later extended the order until it made a final disposition and order on RHS's request for a preliminary and permanent injunction. The trial was scheduled for March 2000.

On January 5, 2000, the State filed a petition for declaratory relief against RHS in the Circuit Court for the City of St. Louis. The next day, the State filed a motion in the district court to stay the federal litigation under Railroad Comm'n of Texas v. Pullman, 312 U.S. 496, 61 S.Ct. 643, 85 L.Ed. 971 (1941), until the present case was adjudicated. The district court denied the State's motion and issued an injunction enjoining the parties from proceeding in

the litigation in the circuit court. The State appealed the district court's order and injunction to the United States Court of Appeals for the Eighth Circuit. In March 2000, the Eighth Circuit stayed all proceedings in the federal district court and allowed the state litigation to go forward.

After the Eighth Circuit's ruling, the State filed its First Amended Petition for Declaratory Judgment seeking to have the circuit court declare the scope and meaning of the Act (Count I) and also sought to have the Act declared valid under the Missouri Constitution (Count II). RHS moved to stay all proceedings pending the United States Supreme Court's decision in Stenberg v. Carhart, 530 U.S. 914, 120 S.Ct. 2597, 147 L.Ed.2d 743 (2000), moved to dismiss part of Count I and all of Count II, and moved for judgment on the pleadings as to the remainder of Count I. The circuit court dismissed Count II for lack of a case or controversy, but denied the remainder of RHS's motions. Therefore, Count I is the only count in the State's petition at issue in this court. Count I requested the following relief:

> WHEREFORE, Plaintiff the State of Missouri requests the Court enter judgment in its favor and against Defendants Reproductive Health Services of Planned Parenthood of the St. Louis Region, Inc., and Robert Crist, M.D.:
>
> A. declaring that the Act applies when a physician performs an abortion only if: (1) he performs an act that kills a living infant after the infant has been partially born; (2) he intentionally performs that killing act after the infant has been partially born; (3) he formed the intent to perform that killing act before the infant was partially born; and (4) the killing act is not necessary to save the life of the mother;
>
> B. declaring that the Act does not prohibit the

standard, traditional abortion procedures--suction curettage, dilation and evacuation (D & E), induction, and hysterotomy;

C. declaring that the Act bans the dilation and extraction (D & X) abortion procedure, also known as the intact dilation and evacuation (intact D & E) or intact D & X abortion procedure, if the infant is intact and living when she is partially born and the abortion is not necessary to save the life of the mother;

D. declaring that the term "living infant" in the Act means a born or partially born child with circulation and/or respiration;

E. declaring that the term "overt act" in the Act means an independent act performed entirely after a living infant is partially born;

F. declaring that the only effect of subsection 7 of the Act is to impose accomplice liability on a person who intentionally helps another person to commit infanticide;

G. assessing all costs against Defendants; and

H. granting all other appropriate relief.

The trial took place over four days, May 24-25, June 5 and August 17, 2000. On June 28, 2000, the United States Supreme Court handed down its decision in Stenberg. Stenberg held that banning the D & E procedure creates an undue burden upon a woman's right to make an abortion decision and is thus unconstitutional, and that a statute which bans the D & X procedure must contain an exception where it is necessary to preserve the life or health of the mother. 530 U.S. at 937, 945-46, 120 S.Ct. 2597. After completion of the trial, RHS moved to

dismiss the case as moot. RHS argued that Stenberg rendered the Act unconstitutional because of its lack of a health exception and any declaration construing the Act, including deciding which abortions it prohibited and which it did not, would amount to a mere advisory opinion about a statute that could never take effect. For the first time, the State argued that the Act could be construed to contain an exception to protect the woman's health. In December 2000, the circuit court issued its judgment, denying RHS's motion to dismiss and entering judgment in favor of the State declaring the meaning of each provision of the Act.

The circuit court made the following factual findings about the manner in which physicians perform various abortion procedures. The circuit court found that the suction curettage procedure, or "vacuum aspiration," is the principal method of abortion during the first trimester of pregnancy. This procedure entails suctioning out the contents of the uterus by means of a tube or cannula that is attached to a suction machine past the woman's cervix into her uterus. Insertion of the cannula and the application of suction are usually sufficient to cause immediate fetal death. However, on occasion, the fetus will jam the suction cannula and the physician must use instruments to crush or fragment the fetus to complete the procedure.

The non-intact D & E procedure is the primary method of abortion during the second trimester of pregnancy. During this procedure, the physician dilates the woman's cervix by means of osmotic dilators and dismembers and evacuates the fetus in utero by means of forceps.

The intact D & E procedure entails extracting the fetus as far as possible through the cervix with as little dismemberment in utero as possible. The physician then collapses the calvarium, or fetal skull, by means of instruments and completes the evacuation of the uterus.

The intact D & E also has a variant, the D & X procedure. The physician dilates the cervix to the maximum extent possible, usually by inserting laminaria over several days, and then manipulates the fetus to a "footlong breech" position, with the feet down toward the cervix. The fetus is then extracted, usually by forceps, without dismemberment, to the point at which the fetal head is at the internal cervical os, whereupon the base of the skull is pierced and the contents of the calvarium are suctioned out. This causes the collapse of the skull and permits the complete removal of the fetus from the woman.

Other procedures are medical induction, hysterotomy and hysterectomy. Induction is a procedure performed during the second and third trimester in which labor is induced so that the uterus contracts and expels the fetus in the same manner as a delivery of an infant at term. Hysterotomy is the equivalent of a caesarian section for delivering a term infant and hysterectomy entails the complete removal of the uterus, including its contents.

The circuit court found that a D & E procedure, whether intact or non-intact, can exhibit many of the same features as a D & X procedure. Thus, at times a non-intact D & E can turn into an intact D & E because there is enough cervical dilation that a pass of the forceps causes most of the fetus to emerge beyond the cervix, necessitating skull compression to complete the procedure. In other cases, an intact D & E can turn into a dismemberment or a non-intact D & E because the physician encounters resistance such that the fetus cannot be removed largely intact but instead disarticulates as it is grasped by the forceps. However, neither an intact or non-intact D & E ever employs the extensive cervical dilation by laminaria or the manipulation of the fetus to convert it to a footlong breech position <u>in utero</u> prior to commencement of the procedure. Essentially, the physician's plan in a D & X procedure is always to deliver the fetus to the point of the after-coming head, and then collapse the head by suction.

The circuit court, in construing subsection 3 of the Act together with subsection 6, concluded that the Act can apply to an abortion only if the physician's plan in carrying out the abortion involves a separate, discrete act performed at or after partial birth of the infant that causes the infant's death. Therefore, the court concluded that the Act does not prohibit suction curettage, D & E, induction, hysterotomy, and hysterectomy because these procedures do not entail a plan by the physician to cause fetal death by a specific, discrete act performed at or after partial birth. However, the court concluded that the Act can apply to intact D & E and D & X procedures because they entail a plan by the physician to cause fetal death by a specific, discrete act performed at or after partial birth. Finally, the court concluded that subsection 8 of the Act provides a "catch-all" defense that incorporates a medical necessity defense.

The State argues that this court lacks jurisdiction because RHS's appeal was untimely. The record reflects that the circuit court entered a final judgment on December 5, 2000. Therefore, unless RHS filed a timely after-trial motion, the judgment became final at the expiration of thirty days, January 4, 2001. Rule 81.05(a)(1). RHS would then have ten days in which to file a notice of appeal. Rule 81.04(a). However, on January 3, 2001, RHS filed a motion to amend the judgment. The circuit court never ruled on the motion. Therefore, the judgment became final ninety days after the after-trial motion was filed, on April 3, 2001. Rule 81.05(a)(2). RHS filed its notice of appeal on April 13, 2001, within ten days after the judgment became final.

However, the State argues that Rule 44.01(d) requires RHS to notice its motion for hearing or otherwise notify the trial court of its motion. The State claims because RHS failed to do so, they waived or abandoned their motion, thus resulting in a motion that was not properly filed. Therefore, the State argues that this court lacks jurisdiction because the judgment became final on January 4, 2001, rendering RHS's notice of appeal, filed on April 13, 2001, untimely.

We disagree with the State's analysis. Rule 81.05 mandates that a judgment becomes final at the expiration of thirty days after its entry unless an authorized after-trial motion is filed. The rule then states that if the after-trial motion is filed, the judgment becomes final ninety days after the motion is filed, at which time the motion is deemed overruled. Rule 81.05(a)(2)(A). As RHS points out, the rule does not condition the postponement of the finality of the judgment on a party following any particular procedure. Rule 44.01(d) only requires that "[a] written motion, other than one which may be heard ex parte, and notice of the hearing thereof shall be served not later than five days before the time specified for the hearing...." This rule concerns service on the opposing party, not the court. The cases that the State cites are inapposite. RHS's appeal was timely filed.

In its first point, RHS asserts the trial court erred in construing subsection 8 of the Act to contain an exception to the statutory ban to protect the life and health of the woman.[2] Subsection 8 of the Act provides "nothing in this section shall be interpreted to exclude the defenses otherwise available to any person under the law including defenses provided pursuant to chapters 562 and 563 RSMo.

The primary rule of statutory construction is that we are to determine the intent of the legislature from the language used, to give effect to that intent if possible, and to consider words used in the statute in their plain and ordinary meaning. Longerman v. May,

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[2] Paragraph (7) of the judgement declares: "by virtue of the provisions of [section] 565.00.8, [section] 565.300 does not apply to the performance, by a licensed physician, including defendant Crist, of any abortion necessary, in appropriate medical judgment, to preserve the life or health of the mother, without limitation as to the physical or mental health, regardless of the type of abortion undertaken[.]"

53 S.W.3d 122, 126 (Mo.App.2001). The plain meaning of words is their meaning "found in the dictionary ... unless the legislature provides a different definition." Lincoln Indus., Inc. v. Director of Revenue, 51 S.W.3d 462, 465 (Mo. banc 2001). Missouri courts do not have the authority to read into a statute a legislative intent that is contrary to its plain and ordinary meaning. State v. Rowe, 63 S.W.3d 647, 650 (Mo. banc 2002). Indeed, in Rowe the Missouri Supreme Court interpreted the statute at issue in accordance with the plain meaning of the words used by the legislature despite the fact that it was unlikely that the result was what the legislature intended.

RHS points out that subsection 5 of the Act contains a specific exemption for procedures used to save the life of the mother or the life of any unborn or partially born child. Invoking the interpretative principle expressio unius est exclusio altarius (the expression of one thing is the exclusion of another), RHS reasons that by including an express but extremely narrow exception to preserve the life of the mother or child, the legislature necessarily meant to exclude a broader exemption to preserve the health of the mother. As a general rule, when statutory exceptions are plainly expressed, Missouri courts will not add exceptions or exclusions beyond those explicitly provided by the legislature. See, e.g., Groh v. Ballard, 965 S.W.2d 872, 874 (Mo.App.1998)(refusing to add to list of statutory reasons for voiding beneficial deed); State v. Williams, 24 S.W.3d 101, 117 (Mo.App.2000) (refusing to add exceptions to the felony murder statute beyond those stated by the legislature.)

RHS further points out that the legislature has elsewhere been fully capable of clearly articulating an exception based on the health of the woman when that is its intent. Section 188.030 provides, in pertinent part: "No abortion of a viable unborn child shall be performed unless necessary to preserve the life or health of the woman." (emphasis added).

RHS further asserts that the legislature's intent to create only a narrow life exception is evidenced by its repeated rejection of amendments to the act that would have allowed health exceptions. Journal of the House, March 3, 1999 (rejecting an amendment that would have exempted procedures to "prevent the occurrence of severe health consequences upon the mother...."), Journal of the Senate, May 3, 1999 and May 4, 1999 (rejecting amendments that would have exempted procedures in cases of "medical emergency" or to "prevent any condition, which if left untreated, could progress to such a point

that death or permanent injury could result....").[3] Indeed, the absence of a health exception was specifically cited by the Governor in his veto message. Missouri Governor's office-speeches, veto of H.B. 427 ("This abortion ban fails to include an exception for medical emergencies or for preserving the health of the mother. A health exception is both constitutionally and ethically essential.") Nevertheless, the legislature overrode the Governor's veto.

The State directs our attention to the phrase "defenses otherwise available to any person under the law" in subsection 8 of the Act, urging that, by use of the broad terms "defenses ... under the law" the legislature intended to incorporate all constitutional as well as statutory defenses to the crime of infanticide. Thus, the State asserts, given the holding in Stenberg that the federal constitution protects a physician from liability for performing a D & X abortion that is necessary, in appropriate medical judgment, to preserve the health of the mother, a physician charged with infanticide could therefore claim as a defense that the Act cannot be constitutionally

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[3] RHS acknowledges that the Senate amendments were offered to a bill never voted on as a whole but containing identical language with respect to the life of the mother exception as the final Senate bill.

applied to him because the procedure was necessary to preserve the health of the mother.

What the State overlooks is the fact that a defendant charged under the statute declared unconstitutional in Stenberg could have asserted precisely the same defense. The same would be true of any prosecution under a facially unconstitutional statute. This is because, under the Supremacy Clause, neither Missouri nor Nebraska could deprive a defendant of federal constitutional defenses if they wanted to do so. Yet the fact that a defendant could, if prosecuted, assert that his conduct was constitutionally protected has never been a basis for upholding a law that is otherwise facially unconstitutional. If it were, no law would ever be declared facially unconstitutional.

Moreover, the State's argument ignores the fact that Stenberg was decided long after the Act was passed. Under the State's reasoning, had Stenberg been decided the other way, there would be no "health of the mother" defense. In interpreting the Act, however, we look to the language of the statute to discern, if possible, the intent of the legislature at the time the statute was enacted. By its reliance on Stenberg, the State implicitly concedes that no health exception can be found within the plain language of the statute.

The State further argues that the legislature's intent to incorporate any constitutional limitations can be found in section 188.010, which declares the legislature's intention "to regulate abortion to the full extent permitted by the Constitution of the United States, decisions of the United States Supreme Court, and federal statutes." In the State's view, the defenses available under the Act would thus evolve to incorporate future changes in federal

precedent and statutes.[4] If this was the legislature's intent, it is not a permissible one because it leaves the statute itself insufficiently clear "to give reasonable notice of the prohibited conduct and to apprise enforcers of the proper standards for enforcement." State v. Young, 695 S.W.2d 882, 886 (Mo. banc 1985). As RHS points out, if the State's interpretation of subsection 8 were correct, the State could simply criminalize all abortions except those protected by the United States Constitution, leaving to the courts the task of determining what is permitted and what is not. This would impermissibly delegate to the courts the task of statutory revision, a matter within the exclusive province of the General Assembly. Id. As the Missouri Supreme Court observed in Young (quoting Papachristou v. City of Jacksonville, 405 U.S. 156, 165, 92 S.Ct. 839, 845, 31 L.Ed.2d 110 (1972)): "It would certainly be dangerous if the legislature could set a net large enough to catch all possible offenders, and leave it to the courts to step inside and say who could be rightfully detained and who should be set at large' United States v. Reese, 92 U.S. 214, 221, 2 Otto 214, 23 L.Ed. 563, 566

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[4] The State draws an analogy to federal statutes imposting criminal penalties for depriving individuals of their constitutional rights. See, e.g., 18 U.S.C. Sections 241, 242. In the State's view, if it is constitutionally permissible for federal statutes to define the elements of a crime by incorporating federal constitutional law, it is equally permissible for the Act to incorporate evolving federal constitutional law as a defense. We disagree. The statutes cited by the state have been construed to apply only to violations of federal constitutional rights that have been clearly established by judicial decisions at the time of the conduct at issue . United States v. Lanier, 520 U.S. 259, 266-67 (1997). Thus, they present no danger of chilling constitutionally protected conduct. In contrast, incorporating evolving federal constitutional law as a defense presents a clear danger that individuals will refrain from constitutionally protected conduct until its legality is clearly established by judicial decision.

(1876)." Young, 695 S.W.2d at 886.

In summary, we find nothing in either the language of the Act or its limited legislative history that supports the view that the Act provides an exception to liability for actions undertaken to preserve the health of the mother.[5] Accordingly, the trial court's findings with respect to subsection 8 of the Act are reversed and paragraph (7) is hereby ordered stricken from the judgment.

RHS in its second point and the State in its fourth point agree that there is a conflict between paragraph (6) of the judgment and the trial court's discussion of legislative intent elsewhere in its memorandum. Paragraph (6) of the judgment provides:

> (6) Section 565.300 can apply to an intact dilation (dilatation) and evacuation abortion procedure (intact D & E), including the procedure known as an intact dilation

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[5] RHS also challenges the trial court's determination that subsection 8 also incorporates an additional life of the mother exception in addition to the express exception in subsection 5. RHS complains that this could lead to confusion over whether an objective or subjective standard applies. Although we do not sustain the trial court's reasoning on this issue, it is clear that subsection 8 does expressly incorporate Chapters 562 and 563, which includes the defense of justification. Section 563.026.1. Prior Missouri cases have recognized that the fact that the procedure was undertaken to preserve the life of the mother is a defense to the crime of abortion. State v. Smith, 130 S.W.2d 550 (Mo. 1939); State v. Sonner, 161 S.W. 723 (Mo. 1913) Subsection 8 therefore incorporates this recognized defense. To the extent the precise contours of the defense may arguably be different from the express defense in subsection 5, this cannot possibly be prejudicial to any potential defendant because it would simply provide an additional available defense.

> (dilatation) and extraction abortion procedure (D & X), performed by a licensed physician, including defendant Crist, if and only if the physician intends to perform and in fact intentionally performs the following acts: (a) serial administration of osmotic dilators (laminaria) over a period exceeding 24 hours; (b) manipulation of the position of the fetus in utero to ensure a footlong breech delivery; (c) partial or complete separation of a living fetus from the mother with the child's head intact with the torso - if vaginally delivered, a fetus is partially separated from the mother when the head in a cephalic presentation, or any part of the torso above the navel in a breech presentation, is outside the mother's external cervical os; if delivered abdominally, a fetus is partially separated from the mother when the child's head in cephalic presentation, or any part of the torso above the navel in a breech presentation, is outside the mother's external abdominal wall; and (d) intentional physical application of force, either by instrument or suction, to the body of the fetus itself, for the purpose of causing, and actually causing, cessation of circulation or respiration or both at or after complete or partial separation (as defined herein) of the living fetus from the mother; provided, that nothing in this judgment shall be construed as declaring that any person performing the acts described in this paragraph (6) of this judgment is necessarily guilty of the crime of infanticide.

(emphasis added). In its memorandum, the circuit court notes several times that the physician must have a "plan" to extract the fetus intact and then perform a discrete overt act causing the death of the fetus. The court then noted that a physician performing a D & X procedure could be liable under the statute, but that conviction would depend on whether the State could prove beyond a reasonable doubt that the actor performed the overt act on the body of the fetus with the purpose of causing fetal death by that act.

Where there is a conflict within the text of a court order, the portion of the order wherein the court gives its imprimatur or exercises its power trumps inconsistent language appearing elsewhere in the order. Jacobs v. Georgiou, 922 S.W.2d 765, 770 (Mo.App.1996). However, Rule 84.14 permits us to give such judgment as the trial court ought to have given. Miller-Stauch Construction Co. v. Williams-Bungart Electric, Inc., 959 S.W.2d 490, 497 (Mo.App.1998). As both parties agree that paragraph (6) of the judgment should be clarified by adding the word "plan" and substituting the phrase "has the purpose" for the word "intends" and the word "purposely" for the word "intentionally," we will modify the judgment accordingly.

RHS also wishes to add the phrase "prior to performing the abortion" between the phrase "if and only if" and "the physician." The State objects to this, however, and urges this court to add the phrase "before complete or partial separation (as defined herein) of the living fetus from the mother with the child's head intact with the torso" in lieu of "prior to performing the abortion." The State claims this language reflects the General Assembly's intent to ban all D & X procedures, subject to the exception to save the woman's life, if the plan to perform the abortion is formed before or after the abortion is begun. RHS claims that in a D & E abortion, a physician may perform all four acts delineated in paragraph (6), and depending on the clinical situation, the plan to perform all these steps may occur before the point of "partial birth." In its memorandum, the trial court made the following findings with respect to the necessary intent:

> In the Court's view, the mens rea requirement of the Infant's Protection Act prevent its application to the "intact" D & E procedure as described in the record, for the simple reason that the physician's plan is merely to remove the fetus in as intact a state as possible and not to ensure that the fetus will emerge intact (i.e. with head joined to torso) to the point where skull compression or aspiration will be

> essential or unavoidable. In other words, the physician's plan in an "intact" D & E can be, and usually is, to employ dismemberment techniques with a minimum of dismemberment, but without such advance preparation of the cervix or manipulation of the fetus as will assure that the fetus can be removed to the point of the aftercoming head, compelling crushing or collapsing the calvarium. Of course, to the extent that the physician's plan in a particular "intact" D & E is in fact to ensure that the fetus is extracted intact so that its skull can be crushed or aspirated, the physician could be liable under the Act.

The trial court further found, contrary to RHS's claims, that neither the non-intact nor intact D & E procedures ever employs the extensive cervical dilation by laminaria or the manipulation of the fetus to convert it to a footlong breech position in utero prior to commencement of the procedure. These findings compel the conclusion that the trial court found, correctly in our view, that the culpable mens rea of the physician must begin before he begins to perform the procedure, rather than during the procedure at any time before the fetus is born or partially born. Therefore, paragraph (6) shall be modified, in relevant part, as follows: "if and only if, prior to performing the abortion the physician plans and has a purpose to perform and in fact purposefully performs the following acts...."

> Finally, RHS wishes to add the following sentence to the end of paragraph (6):
>
> Section 565.300.3 does not apply to the performance by a licensed physician, including Dr. Crist, of any intact D & E abortion where the physician's plan is to remove the fetus in as intact a state as possible but without such advance preparation of the cervix or manipulation of the fetus as will assure that the fetus will be removed to the point of the aftercoming head, compelling crushing or collapsing the calvarium.

We will not add this sentence as paragraph (6) of the judgment clearly denominates, in conjunctive form, four elements that the State must prove. Two of these elements are serial administration of osmotic dilators over a period exceeding 24 hours (advance preparation of the cervix) and manipulation of the position of the fetus in utero to ensure a footlong delivery. Therefore, the modification requested by RHS is not necessary.

The State's first contention in its cross-appeal is that the circuit court erred in omitting from paragraph (7) of the judgment language stating that subsection 8 of the Act incorporates federal constitutional law on abortion as a defense to the Act and that the scope of the constitutional defense under subsection 8 evolves as federal constitutional law on abortion evolves. Our discussion of RHS's first point resolves this issue adversely to the State. Point denied.

The State's second contention is that the circuit court erred in omitting from paragraph (7) of the judgment language stating that the State bears the burden of persuasion as to the lack of medical necessity of an abortion proscribed by subsection 3 of the Act once the physician has properly injected a medical necessity defense under subsection 8 of the Act. We have stricken paragraph (7) of the judgment in response to RHS's first point. This contention is therefore moot.

The judgment is affirmed as modified.

IN THE MISSOURI COURT OF APPEALS
EASTERN DISTRICT
DIVISION FOUR

STATE OF MISSOURI,	)	No. ED79435
	)	
Respondent/Cross-Appellant,	)	Appeal from the Circuit
	)	Court of the City of
vs.	)	St. Louis
	)	
REPRODUCTIVE HEALTH	)	
SERVICES OF PLANNED	)	
PARENTHOOD OF THE	)	
ST. LOUIS REGION, INC., and	)	
ROBERT CRIST, M.D.,	)	
	)	FILED: November 19,
Appellants/Cross-Respondents.	)	2002

CONCURRING OPINION

I concur fully in the per curiam opinion of the court. The opinion quite properly does not address the constitutionality of the Act. That issue will be determined by the federal district court when this case is finally resolved. The briefs of both parties, however, reflect the implicit assumption that the absence of a health exception will render the Act unconstitutional under Stenberg v. Carhart, 530 U.S. 914, 120 S.Ct. 2597, 147 L.Ed.2d 743 (2000). I write separately to explain why Stenberg is based on an implicit assumption that the record in this case at least suggests may not be true.

Stenberg struck down a Nebraska statute that the court found banned both the rarely-performed D & X procedure and the more commonly performed D & E procedure. Id. at 938, 120 S.Ct. 2597. The trial court in this case found and the parties do not dispute that Missouri's Act "does not apply to the performance, by a licensed

physician, ... of a dismemberment or "nonintact" dilation (dilatation) and evacuation (D & E) abortion."

The Supreme Court further held that Nebraska had failed to demonstrate that banning the D & X procedure without a health exception may not create significant health risks for women because the record before it showed that significant medical authority supports the proposition that in some circumstances, D & X would be the safest procedure. Id. at 932[1] Curiously, however, after enumerating these perceived benefits of intact extraction of the fetus, the Court never addresses the more fundamental question presented by Missouri's (and arguably Nebraska's) Act: Why is it necessary or desirable to perform the procedure on a fetus that is still alive? Or, to state the issue in constitutional terms: What, if any, risk is presented to the health of the mother by requiring her physician to take steps to humanely bring about the demise of the fetus before undertaking intact extraction from the uterus? By failing to discuss this issue, the Stenberg opinion at least implicitly assumes either that there is some medical benefit to the fetus being alive during extraction from the uterus or that taking steps to humanely cause the demise of the fetus before extraction would pose some appreciable additional health risk to the mother. It is not at all clear, however, that the Court had any factual basis for either assumption.

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[1]Citing the findings of the district court, the advantages of the D&X procedure were identified as (1) it permits the fetus to pass through the cervic with a minimum of instrumentation; (2) it reduces operating time, blood loss and risk of infection; (3) it reduces complications from bony fragments; (4) it reduces instrument inflicted damage to the uterus and cervic; (5) it prevents the most common causes of maternal mortality (DIC and amniotic fluid embolus); and (6) it eliminates the possibility of "horrible complications" arising from retained fetal parts. Id.

The trial court expressly found and the parties do not dispute that Missouri's Act "does not apply to the performance, by a licensed physician, . . . of any abortion prior to the time that a fetal heartbeat is detectable, nor does it apply to an abortion at any time when the fetus has no detectable heartbeat." Thus, Missouri's Act clearly permits intact extraction of a fetus from the uterus, with all of its perceived benefits identified by the Supreme Court in Stenberg. It merely requires that the physician take steps to humanely bring about the demise of the fetus before performing the procedure.

We have no record of the debates leading up to the enactment of Missouri's Act and thus do not know for certain what precise concerns led to its enactment. However, Dr. Cook's testimony at the trial of this case identifies one of the more likely concerns. Dr. Cook testified that in his opinion, the D & X procedure was needlessly cruel because the infant was still alive and capable of feeling pain. The basis for Dr. Cook's opinion that the fetus can suffer pain as a result of the D & X procedure was not explored further because it was not the focus of the proceeding below. Whether a fetus can, in fact, experience pain is apparently a matter of some dispute. In Women's Medical Professional Corp. v. Voinovich, 911 F.Supp. 1051, 1072-74 (S.D.Ohio 1995), the court recounted testimony by two neurosurgeons who generally agreed that a fetus at the age of twenty to twenty-four weeks will react to noxious stimuli, but neither could state with certainty that the fetus experiences a conscious awareness of pain. It is indeed difficult to imagine how this could ever be conclusively established. But if there is uncertainty as to whether the fetus can experience pain as a result of the D & X procedure (or, for that matter the non-intact D & E, which involves actual dismemberment of the fetus), must a State sit idly by and tolerate potential cruelty when there are humane alternatives that may pose no appreciable additional risk to the mother's health?

In Stenberg, the Supreme Court somewhat cryptically made

reference to an AMS report which states that, after twenty weeks, "[s]ome physicians use intrafetal potassium chloride or digoxin to induce fetal demise prior to a late D & E (after twenty weeks), to facilitate evacuation." 530 U.S. at 924, 120 S.Ct. 2597 (citing American Medical Association, Report of Board of Trustees on Late-Term Abortion, pp. 491-92). Although it was not the focus of the hearing below, Dr. Crist's and Dr. Stubblefield's testimony both suggest that cutting the umbilical cord would also bring about fetal demise, thus ensuring the fetus would not experience pain during the process of extraction from the uterus. Dr. Stubblefield also testified that all abortions performed after seventeen weeks at Boston Medical Center, where he chairs the department of obstetrician and gynecology, are done by labor induction and only after the introduction of a saline solution into the amniotic sac, which causes the demise of the fetus.

I cite this testimony because it at least suggests that there are safe and humane measures that can be employed by a physician without appreciable additional health risks to the mother that will cause the painless demise of the fetus prior to extraction from the uterus. I readily acknowledge that this was not the subject or focus of the hearing below and that there may well be other considerations not explored in the limited record before us. I do respectfully submit, however, that a complete examination of this subject is both necessary and appropriate in any proceeding to determine the constitutionality of Missouri's Act.

Lawrence G. Crahan, Judge

February 24, 2006